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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RONALD MONTIQUE WILLIAMS, Defendant and Appellant.	C038590 (Super. Ct. No. 98F10219)

A jury convicted defendant Ronald Montique Williams of second-degree murder (Pen. Code,[1] § 187, subd. (a)). Defendant argues: (1) the trial court erred in refusing "to appoint counsel for [defendant]" after defendant decided he could not represent himself during trial; (2) the trial court erred in refusing to grant use immunity to a defense witness; (3) the court incorrectly instructed the jury on self-defense; (4) CALJIC No. 2.90 violated defendant's due process and equal protection rights; and (5) we should remand this action for a

[1] All further unspecified statutory references are to the Penal Code unless otherwise indicated.

further hearing into possible juror misconduct. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and his sister, Robbie Banks, killed Clarence Dinkins by stabbing him to death.

On the day of the stabbing, Dinkins and another man, James Oakley, confronted a woman who was trying to steal a car stereo from Oakley's truck. Defendant's sister, Banks, came over and got into an argument with Dinkins about the way he handled the thief. During their argument, Dinkins slapped Banks in the face causing her lip to bleed.

Banks got into Oakley's truck and Oakley and Dinkins drove Banks to her mother's home. As they drove to Banks's home, Dinkins and Banks continued to argue. After they arrived at their destination, Banks told Dinkins that if he hit her on her own block, she would cut him and she would get her brother to cut him too. Then Banks took Oakley's truck keys and threw them onto the roof. Banks also hit Oakley's truck with a lawn chair several times.

Dinkins said he was going to get a knife. Dinkins left and then returned wearing a heavy jacket. Dinkins told Oakley he had a knife. Oakley did not see a knife, but did see something that appeared to be the outline of a knife under Dinkins's clothing. Dinkins then left the scene as Banks threatened to get her brother.

Banks went into the house and reemerged shortly thereafter. Defendant followed her out of the house. Oakley told the police

defendant had a knife, a club, or a comb in his back pocket when he came outside. Another witness, defendant's mother, testified she did not see her son pick up a knife or any other type of weapon before he left the house.

When defendant came outside, he told Oakley he would take care of what Oakley had not finished. Defendant and Banks ran down the street after Dinkins. Defendant then got on a bike and started chasing Dinkins.

Several witnesses testified about the fatal confrontation. Marie Telf saw a man, Dinkins, walk by real fast. Next, she saw a second man, defendant, ride up on his bicycle, to catch Dinkins. A woman, Banks, was following behind and yelling to defendant to catch Dinkins. Telf testified defendant took the first swing at Dinkins and hit him in the chest. Dinkins fell to the ground the second time defendant hit him. According to Telf, Dinkins never swung back. After this, defendant rode away on his bicycle. Telf did not see defendant get injured in the altercation. Then Banks came up and stabbed Dinkins. When she was done, Banks said she had killed Dinkins. Banks jumped into the back seat of a car and the car drove off.

Defendant and Dinkins were already fighting when J. C. Lampkin first saw them. Lampkin saw defendant stab Dinkins several times. As defendant got up and walked away, defendant said Dinkins had cut him. Lampkin saw blood on defendant. Lampkin confirmed Banks came up, stabbed Dinkins, got into a car and drove away.

Tammy Herman testified she saw two kids outside watching Dinkins and defendant fighting. Herman saw defendant swing at Dinkins first, then Dinkins swung back. Dinkins put his hands up and then fell to the ground. Defendant kicked Dinkins two or three times and then walked away. Then Banks came up and stabbed Dinkins.

Fifteen-year-old Daniel Morris witnessed the stabbing, too. Morris saw Dinkins running away from defendant. Dinkins's pants were falling down and he was bleeding from his posterior. Dinkins fell to the ground. Defendant walked up to Dinkins, said something and then walked away. Banks came up and stabbed Dinkins. While she stabbed him, Morris testified she shouted, "You stabbed my brother." Morris testified Banks then walked away.

Twelve-year-old Zeke Derr saw Dinkins trying to defend himself while defendant attacked him with a knife. Defendant was standing over the victim as defendant stabbed him. Defendant then dropped the knife and raised his hands in the air and said "now what?" and then walked away. Banks ran up to Dinkins and stabbed him several more times and also hit him. As she stabbed Dinkins, Banks said, "you tried to kill my brother." Then Banks ran away.

Banks did not see the start of the fight between Dinkins and defendant. When she got to the scene, Banks saw her brother covered in blood and heard him say, "He tried to kill me." Banks did not remember stabbing Dinkins.

In all, defendant and Banks stabbed Dinkins 11 times. Dinkins died from those wounds. The doctor who testified as to Dinkins's cause of death also testified a stab wound on defendant's arm could have been a "defensive wound." Defendant did not testify.

The jury convicted defendant of second-degree murder. (§ 187) Defendant appeals. We shall address other relevant procedural facts in the body of our discussion.

DISCUSSION

I

Appointment of Counsel

Defendant argues the trial court erred "by refusing to appoint counsel for [him]" during the trial. We disagree.

Defendant represented himself in this case. On the first day of trial, defendant asked the court to appoint him advisory counsel. Defendant told the court, "If I can get a lawyer who's ready to go to trial right now, I will take a lawyer. [¶] But I will not waive time, and I will not do anything to upset the trial." Based on the court's representations that a trial attorney would not likely be able to show up the first day of trial prepared to go forward, defendant agreed to proceed with trial without advisory counsel.

Defendant renewed his request for advisory counsel the second day of trial by written motion. The court denied that request. The second day of jury selection, however, the court introduced Emmett Mahle as defendant's advisory counsel. Mahle had represented defendant earlier in the case.

On the sixth day of trial, the prosecutor raised the objection that Mahle might be exceeding his role as advisory counsel by advising defendant on every question defendant asked on cross-examination of the prior witness. The court told the defendant that it too had noticed this. The court admonished defendant, "You are the attorney, you can take a minute to consult with Mr. Mahle before you commence questioning. Once we begin, I'd like to see you ask your own questions. If you need help with one, you can take a minute to consult, that's fine. [¶] I'm going to ask each of you [to] consider the extent to which Mr. Mahle provides with you [*sic*] the actual question versus trying to construct your own question and scope of questioning on your own than relying on him for assistance."

At this point, defendant and the court engaged in the following colloquy:

"Defendant []: Your Honor, I want to address the Court. I don't feel that I can represent myself right now.

"The Court: What are you asking at this point?

"Defendant []: These questions that I need from my attorney, uhm, some time[s] they help me a little bit, some times I have a few of my own. And if I can't get [a] few questions from him, then I'm going to need an attorney.

"The Court: Well, Mr. Williams, you were advised of your right to an attorney, but you were also advised there were significant risks in representing yourself. And you chose to represent yourself.

"I have gone one better and giv[en] you one better by allowing advisory counsel sitting at the table with you and giving you additional advice which is much more advice and assistance than most people who choose to represent themselves ever receive.

"Nonetheless, there are certain risks and problems representing yourself.

"I don't know if Mr. Mahle feels that he's in a position to take on this case and represent you at this point. While he has a greater familiarity with the facts certainly tha[n] an attorney who had not been familiar or been involved in this case -- I don't want to presume to say that for him.

"But, Number 2, I don't want it to be a situation where you are manipulating both the Court in trying to get both things.

"I'm not telling you you can't consult your attorney regarding questions. It was appearing through the questioning of that last witness that Mr. Mahle was giving you questions, and you were just basically voicing those questions.

"The concern is that I told you, Number 1, you represent yourself. I want the jury to see you represent yourself.

"If you need to talk to him, turn to him to ask him -- if when you finish, is there any other point, any clarification, that's one thing. But I think that there is a risk if you just allow him to whisper something in your ear and it comes out your mouth. Then self-representation appears to be in the jury's view just a sham.

"Defendant []: But they understood, I had advisory counsel.

"The Court: Right. I understand that.

"I'm just telling you: As a Judge, you asked me to represent yourself. You asked a prior judge to represent yourself. Your position has always been that you want to represent yourself.

"Defendant []: With advice.

"The Court: No. That has not always been your position.

"You initially asked to represent yourself, Mr. Williams, you were strongly advised of the risks. No judge likes to see someone represent themselves for this very reason -- for a number of reasons. I'm sure you were advised at that time that you did not have a right to advisory counsel, you did not have a right to a co-counsel.

"You didn't have an absolute right to change your mind because the timeliness and circumstances of that change in mind would affect the Court's ability to grant you that request.

"We are in the middle of the trial, and it's underway. At the time we started, we talked about your representation, and you were the one who said I don't want to delay the case to get an attorney, I very much want to represent myself, let's go.

"Defendant []: I don't want Mr. Mahle to get in any trouble. I'll do my best to get --

"The Court: Pardon?

"Defendant []: I don't want Mr. Mahle to get in trouble. I'll do my best.

"The Court: I don't see that he's in any trouble. It wasn't a reprimand to Mr. Mahle. The Court is very familiar with Mr. Mahle's experience and reputation.

"Defendant []: I --

"The Court: Let me finish.

"I have no -- it's not my intent by my statement to denigrate or criticize Mr. Mahle at all. In fact if anything, I believe that Mr. Mahle's willingness to participate on short notice is his ability to jump right in the middle of this case has been a benefit to you and a benefit to the Court. I'm glad he's here quite honestly. Although I don't normally give advisory counsel to someone [who] wants to represent himself.

"Mr. Mahle understands his obligations, and his obligations as advisory counsel, he's taken quite seriously. The role of advisory counsel is difficult.

"He wasn't doing anything wrong. He was trying to help you out in providing you with the questions. I understand that. So please don't take my comments to you as criticism of him or criticism of you.

"It is very important, however, that your role as counsel for yourself be clear to the jury. That's why I made that statement. If you find yourself in the position that Mr. Mahle's speaking for you, or speaking to you and you appear to be voicing his words, it might take away from your effectiveness of your statement that you are representing yourself in front of the jurors. That's what I'm saying.

"It's not a criticism to either one of you. It's a comment that hopefully will help you guys walk that line that I think overall has been done quite well.

"Defendant []: Okay.

"The Court: So are you comfortable with that, Mr. Williams?

"Do you understand what I'm saying? I'm not criticizing you or him.

"Defendant []: Okay. I can do my own questions.

"The Court: I'll give you a chance to talk to Mr. Mahle. We'll have the jury come back here in just a second. . . .

"Defendant []: Your Honor, it was just -- that last exchange, it was more tactical than others, but I shouldn't have any more problems.

"The Court: I'm not by any stretch saying you cannot consult with Mr. Mahle during questions of a witness. You certainly can.

"Just [the prosecutor's] objection. That was the first time I noticed it to that degree. I felt they were valid observations. I am not saying it was really anything done wrong.

"So are you prepared to -- and ready to represent yourself? You are comfortable with this situation?

"Defendant []: (Nodding affirmative).

"The Court: You're nodding. Is that a yes?

"Defendant []: Yes."

Defendant cites *People v. Elliott* (1977) 70 Cal.App.3d 984, 991-993, for the proposition that the trial court erred in failing to further inquire into whether defendant could properly continue in representing himself, or whether the court should have appointed counsel for defendant midtrial. "[O]nce defendant had proceeded to trial on a basis of his constitutional right of self-representation, it is thereafter within the sound discretion of the trial court to determine whether such defendant may give up his right of self-representation and have counsel appointed for him." (*Id.* at p. 993.) In *Elliott, supra,* the court concluded that *once a defendant requests* to be relieved as his own attorney during trial, the court must engage in a multi-factor inquiry on the record to support the exercise of its discretion in granting or denying such a request. (*Id.* at p. 993-994.)

Our Supreme Court in *People v. Gallego* (1990) 52 Cal.3d 115, 164, confirmed the *Elliott* factors were relevant and helpful in making this decision, but held that they were not absolutes. Instead, the trial court must consider the totality of the circumstances as to whether the defendant may change his mind and be given counsel midtrial after he has waived it. (*Ibid.*)

Here, however, as demonstrated by the colloquy between the court and defendant, defendant did not request to be relieved as his own attorney or that the court appoint him counsel. Rather, when the prosecutor brought up the possibility that defendant's ability to represent himself would be compromised by defendant's

complete reliance on advisory counsel (see, e.g., *People v. Gallego, supra*, 52 Cal.3d at p. 163 [rejecting claim of interference of self-representation right by advisory counsel], the court admonished defendant of the potential adverse impact of those actions. The court suggested defendant should not be so reliant on advisory counsel, but rather take the leading oar in his defense as he desired. It was at this point that defendant said he did not think he could represent himself. When asked for clarification, defendant told the court, "if I can't get [a] few questions from him, then I'm going to need an attorney." The court clarified its prior admonition telling defendant he could consult with counsel if he needed to and again asked if defendant was prepared to go forward. At that point, defendant abandoned any request that he be appointed counsel, and said he was prepared to go forward on his own. Viewing this colloquy as a whole, defendant did not make a proper request for the appointment of counsel or to be relieved as his own attorney. To the extent his comments could be construed as a request for counsel, defendant affirmatively withdrew that request. Having failed to make a proper request, defendant may not argue the trial court abused its discretion in failing to properly consider it.

II

Use Immunity

Defendant next argues the trial court erred in failing to grant use immunity to a defense witness who would testify, save for an assertion of his fifth amendment privilege against self-

incrimination, that defendant was not the aggressor in the fatal fight. We conclude the trial court had no power to grant such immunity.

Under such circumstances, use immunity is "'[I]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom. . . .' [Citation.] Use immunity does not afford protection against prosecution, but merely prevents a prosecutor from using the immunized testimony against the witness." (*People v. Cooke* (1993) 16 Cal.App.4th 1361, 1366.)

The California Supreme Court has not decided whether a trial court has inherent authority to grant use immunity to a witness to vindicate a defendant's right to a fair trial. (*People v. Lucas* (1995) 12 Cal.4th 415, 460.) In *Lucas, supra,* the court noted the vast majority of cases have rejected the notion of an inherent power to confer immunity. (*Ibid.*) The *Lucas* court further characterized the proposition a court has the inherent power to grant use immunity to a defense witness as "doubtful." (*Ibid.*)

In analyzing a claim a trial court erred in refusing to grant immunity, the *Lucas* court assumed "arguendo the doubtful proposition that the trial court has inherent authority to grant immunity" and applied "the stringent offer of proof requirements" of *Government of Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964 (*Smith*). (*People v. Lucas, supra,* 12 Cal.4th at p. 460.) The *Smith* court held "the opportunities for judicial use of this immunity power must be clearly limited:

immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." (*Smith, supra*, 615 F.2d at p. 972, fn. omitted.)

Here, Banks's attorney submitted the following offer of proof when she sought judicial use immunity for a witness named Jeff Montaie: "[O]n November 22nd, the day this happened, that [Montaie] was in a green house at the corner of Roanoke and South and May. He's lighting up some dope when [Dinkins] walked in. And [Dinkins] said something like: I'm going to die for a smoke. And I said: Why are you -- why do you say that. But I was high at the time. [¶] [Dinkins] reached over to grab one of my butcher knives, took one. He asked me if he could have it. He asked me if he could have it, and I said he could. I used them to cook fish and other things. [¶] Then he describes the knife that [Dinkins] took. And then followed [Dinkins] outside on the sidewalk. And then he noticed [Dinkins] and [defendant] in the street arguing. *And that [Dinkins] took the knife he got from me out of his waist band, he lunged at [defendant] and cut him.* [¶] And the statement I have, he describes where [defendant] was cut. And he says he's pretty sure it's his right arm. He's not sure how [defendant] got the knife away from [Dinkins]. He thinks that [defendant] punched [Dinkins] who then dropped the knife, and he picked up the knife -- [defendant] picked up the knife. [¶] And he recalls

[defendant] and [Dinkins] struggling, and he can't recall seeing [defendant] stab [Dinkins]. He just remembers [Dinkins] was down on the street. [¶] He said he was two and a half car lengths away from where they were fighting, uh. That [defendant] dropped the knife, and that he saw [Banks] walk up yelling: What have you done to my brother. [¶] [Dinkins] tried to pick the knife up. He wasn't dead yet, I think he tried to stab [Banks]. She got angry, and she started stabbing him." (Italics added.)

Montaie informed the court he believed he had a fifth amendment privilege not to testify and that he intended to assert that privilege. The court appointed counsel for Montaie. In addition to the statements concerning drug use and giving Dinkins a knife as stated in the offer of proof, Montaie's counsel stated his client was concerned about his potential criminal liability for having taken the murder weapon after the crime and hidden it. The trial court ultimately found Montaie was entitled to assert the privilege.

The court assumed it had the power to grant use immunity, but declined to exercise its discretion to grant use immunity to Montaie.

Based on the offer of proof, we conclude the *Smith* criteria for the granting of use immunity have been satisfied. First, the defendant properly sought use immunity from the court by joining in his co-defendant's attorney's request.

Second, the proffered testimony that the victim engaged in a sudden and deadly counterassault was clearly exculpatory and

essential to the defense of self-defense. (See *People v. Trevino* (1988) 200 Cal.App.3d 874 [aggressor in simple assault may resort to self-defense without withdrawing if the victim retaliates with a sudden and deadly counterassault].) This testimony was not, as the People suggest, merely cumulative, but went to the heart of an essential issue of the case. We further reject the People's argument this evidence was limited to the issue of how Dinkins armed himself. While the oral argument focused on that issue, the offer of proof specifically identified one of the key pieces of testimony as who drew the knife first.

Third, the People neither argued below, nor here, that they had a strong governmental interest countervailing the granting of immunity.

Given our conclusion defendant's offer of proof met the criteria enumerated by *Smith, supra,* 615 F.2d 964, we are thus confronted with the question the Supreme Court has not answered: Does the trial court have the inherent power to grant use immunity to a defense witness? For the reasons thoughtfully articulated in *People v. Sutter* (1982) 134 Cal.App.3d 806 (*Sutter*), we conclude the trial court did not have the power to grant defendant's witness use immunity.

In *Sutter, supra*, the appellate court stated, "once a defendant testifies under a grant of use immunity, the prosecution has the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." (*Id.* at p. 813.) This

places a "'heavy burden'" on the prosecution and counsels against the inherent power of the court to grant use immunity. (*Id.* at p. 816.)

The court further noted, "'the state is under no obligation to make a witness available to testify for a defendant, or on behalf of the People for that matter, by granting him immunity from prosecution.' [Citation.]" (*Sutter, supra,* 134 Cal.App.3d at p. 814.) "'While the prosecutor may not prevent or discourage a defense witness from testifying [citations] it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity.' [Citation.]" (*Id.* at p. 816.)

Next, the court stated, "Additionally, defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators. Codefendants could secure use immunity for each other and each immunized witness could exonerate his codefendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense." (*Sutter, supra,* 134 Cal.App.3d at pp. 816-817.)

We are mindful of the *appearance* of unfairness of the ability of the People to force witnesses to testify through their utilization of use immunity, while the defendant is apparently hamstrung by his inability to exercise this same

power. The *Sutter* court rejected this claim as well: "a criminal proceeding is not 'symmetrical' as the prosecution and defense have different rules, powers and rights." (*Sutter, supra,* 134 Cal.App.3d at 816.) Due process simply does not require the court to grant defendant's witnesses use immunity.

We, like the First Appellate District in *People v. Cooke, supra*, 16 Cal.App.4th at page 1371, and the majority of the other courts that have examined the rationale of *Smith, supra,* 615 F.2d 964, reject the argument the trial court had the inherent power to grant defendant's witness use immunity.

III

Self-Defense Instructions

Defendant argues CALJIC No. 5.17 on imperfect self-defense is overbroad, ambiguous, and misleading because it fails to define the terms "'unlawful or wrongful conduct.'" Defendant also contends this instruction, coupled with CALJIC No. 5.54, fails to advise the jury of the defendant's right to use self-defense in the face of a "sudden and deadly counterassault to a simple assault." We reject defendant's claims.

A

Ambiguity

We start with defendant's ambiguity claim. CALJIC No. 5.17, as read to the jury, provides: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder, this would be so even

though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual or unreasonable belief is not a defense to the crime of voluntary and involuntary manslaughter. [¶] As used in this instruction, 'imminent' peril or danger means one that's apparent, present, immediate and must be instantly dealt with or must so appear at the time to the slayer. [¶] However, this principle is not available, and malice aforethought is not negated if the defendant by his *unlawful or wrongful conduct* created the circumstances which legally justified his adversary's [] use of force." (Italics added.)

Defendant argues the failure of the court to define the term "'unlawful or wrongful conduct'" rendered this instruction fatally ambiguous. According to defendant, a reasonable juror could understand this instruction to deny defendant the defense of self-defense if Dinkins had retaliated with a knife in reaction to defendant's simple assault with his fists. Defendant is wrong.

"While the court has the obligation to instruct on general legal principles so central to the determination of guilt or innocence that to ensure a fair trial they must be explained to the jury [citation], it is not incumbent upon the trial court to instruct on specific points developed at trial. [Citation.]" (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

Here, the questioned phrase of CALJIC No. 5.17 properly follows the California Supreme Court when it stated: "It is well established that the ordinary self-defense doctrine--

applicable when a defendant *reasonably* believes that his safety is endangered--may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citation.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

Defendant's focus on four words of the instruction -- unlawful or wrongful conduct -- is too narrow. "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

Here, defendant argues the jury could determine self-defense was unavailable to him if he attacked Dinkins merely with his fists and Dinkins unjustifiably and suddenly responded with deadly force. The relevant part of CALJIC No. 5.17 states the defense of imperfect self-defense is unavailable "if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use [] of force." (CALJIC No. 5.17.) Here, the court also instructed the jurors: "An assault with a fist does not justify a person being assaulted in using a deadly weapon in self-defense unless that person believes, and a reasonable person in the same or similar

circumstances would believe, that the assault is likely to inflict great bodily injury upon him." (CALJIC No. 5.17.) Thus, as instructed, the jury could not find the limited fisticuffs hypothesized by defendant sufficient to satisfy the requirement of *unlawful or wrongful conduct that legally justified* Dinkins to use deadly force. Simply put, the instruction was correct.

More importantly, defendant failed to ask the court for any modification to this instruction. The claim that the trial court failed to give clarifying or amplifying instructions is waived because defendant did not request such clarification in the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1020.) "[D]efendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*People v. Daya, supra,* 29 Cal.App.4th at p. 714.) We reject defendant's claim of ambiguity.

B

Sudden and Deadly Counterattack

Defendant also argues CALJIC Nos. 5.17 and 5.54 fail to inform the jury that "if the victim of a simple assault engages in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw, and may reasonably use necessary force in self-defense." The evidence in this case does not support such an instruction.

In addition to the text of CALJIC No. 5.17 and No. 5.31 set forth above, the court instructed the jury with CALJIC No. 5.54

as follows: "The right of self-defense is only available to a person who initiated an assault if he's done all of the following: One, he has actually tried in good faith to refuse to continue fighting. Two, he has clearly informed his opponent that he wants to stop fighting, and three, he has clearly informed his opponent that he has stopped fighting. After he has done these three things, he has the right to self-defense if his opponent continues to fight."

There is an exception to this withdrawal rule embodied in *People v. Trevino, supra,* 200 Cal.App.3d 874, 879. There, the court explained, "it is settled that a person who has sought combat may decline further struggle and, if he really and in good faith does so before the killing, the killing may be justified on the same grounds as if that person had not originally been the aggressor. [Citation.] Furthermore, if a victim of a simple assault engages in a sudden and deadly counterassault, the original aggressor need not attempt to withdraw, and may reasonably use necessary force in self-defense."

Defendant argues the jury should have been instructed with this rule. "Even in the absence of a request, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence; that is, those principles that are closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. [Citations.] On the other hand, a trial court may refuse to give an entirely accurate instruction if it is

duplicative or there is no evidence to support it, and may modify any proposed instruction so long as the modifications are themselves correct and pertinent to the issues." (*People v. Dieguez*, *supra*, 89 Cal.App.4th at p. 277.)

Here, nothing in this record establishes the facts necessary to require the court to give any instruction on the inapplicability of the withdrawal rule. None of the eyewitnesses testified that Dinkins pulled out the knife suddenly in response to being attacked by defendant's fist. The sole evidence presented to the jury that shed any light on this point was that Dinkins armed himself prior to the attack, defendant had a "defensive" wound in his arm, and defendant said Dinkins tried to kill him after the attack. These pieces of evidence prove nothing about a "sudden and deadly counterassault." As such, no jury could rationally conclude Dinkins engaged in a such an attack requiring further instruction to the jury. Thus, the trial court had no sua sponte duty to instruct the jury on this exception to the withdrawal rule.

IV

CALJIC No. 2.90

Recycling the tired argument repeatedly rejected by this court and many others, defendant argues CALJIC No. 2.90[2] violates

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[2] As given here, CALJIC No. 2.90 provided: "Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. [¶] It is that state of the case which, after

his due process rights. He also argues the instruction violates his equal protection rights. We disagree.

There are only so many ways to beat a dead horse, and this court has concluded the due process challenge to CALJIC No. 2.90 has been beaten enough. We no longer entertain the due process challenge to the constitutionality of the reasonable doubt instruction. (See *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286-1287 (*Hearon*).)

Defendant's equal protection challenge requires slightly more discussion. Defendant argues CALJIC No. 2.90 "*provides no adequate and uniform standard* for determining the level of certainty to which the jury must be persuaded . . . ." (Italics added.) An almost identical contention, that the instruction "'gave the jury no guidance as to the level of certainty,'" was held to be frivolous in *Hearon*, *supra,* 72 Cal.App.4th 1285, at pages 1286, 1287.

Defendant claims a result contrary to *Hearon* is now required by the United States Supreme Court's decision in *Bush v. Gore* (2000) 531 U.S. 98, 105-106 [148 L.Ed.2d 388, 399] (*Bush*). We disagree.

In *Victor v. Nebraska*, (1994) 511 U.S. 1 [127 L.Ed.2d 583] the high court held that, "The beyond a reasonable doubt standard is a requirement of due process, but the Constitution

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the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

neither prohibits trial courts from defining reasonable doubt nor requires them to do so . . . ." (*Id.*, at p. 5.)

None of the opinions in *Bush* purports to reject *Victor, supra*, 511 U.S. 1 or hold that trial courts must define reasonable doubt. It is fundamental that a case is not authority for an issue neither raised nor considered. (*People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4.)

Rather, in *Bush*, the court majority carefully distinguished the election contest before it from the ordinary case in which a jury evaluates evidence at a criminal trial. In the election contest, "The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment." (*Bush*, *supra*, 531 U.S. at p. 106.) Here, in contrast, the factfinder confronted numerous persons who appeared as live witnesses and had to decide "whether to believe [each] witness." (*Ibid.*) Defendant does not argue that the assessment of credibility can be confined by a series of specific rules, as in *Bush*. Nor does *Bush* suggest that the next step in the process, the determination whether the facts found by the trier of fact establish guilt beyond a reasonable doubt, is "susceptible to much further refinement" through "specific rules designed to ensure uniform treatment." (*Ibid.*)[3]

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[3] Justice Stevens's dissent did not call *Victor* into question. On the contrary, it argued there is "no reason to think that the guidance provided to the factfinders, specifically the various canvassing boards, by the 'intent of the voter' standard is any less sufficient--or will lead to results any less uniform--than, for example, the 'beyond a

Defendant contends that further refinement can easily be accomplished, but his only specific suggestion is that the jury "could be instructed that there are multiple standards of proof in the law" i.e., by preponderance of the evidence; by clear and convincing evidence; and by proof beyond a reasonable doubt." The point has no merit.

None of the closing summations in this case described the lesser standards of proof or related them to the standard beyond a reasonable doubt. However, the omission of inapplicable standards from a particular case does not raise the specter that the applicable standard will be applied in an unequal manner. The jury had to decide whether the evidence placed defendant's guilt in doubt and whether that doubt was reasonable. The definitions of "preponderance of evidence" and "clear and convincing evidence" do not tell the jury how to determine whether a doubt is reasonable; they are not essential or even particularly helpful to that task. Their omission in this case did not violate equal protection.

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reasonable doubt' standard employed every day by ordinary citizens in courtrooms across this country." (*Bush*, *supra*, 531 U.S. at p. 125 [148 L.Ed.2d at p. 411] (dis. opn. of Stevens, J., fn. omitted).)

The court's holding that the "intent of the voter" standard is insufficient does not disclose any belief that the beyond-a-reasonable-doubt standard is similarly inadequate.

V

Juror Misconduct

Defendant's final assignment of error is that the trial court failed to grant him a continuance of the hearing on the new trial motion to bring in jurors to examine them on the possibility the bailiff engaged in prejudicial misconduct by providing information to the jury in this case. We reject this claim.

At the conclusion of the jury trial, the court reappointed Mahle as defendant's counsel for the purposes of bringing a new trial motion. Defendant's new trial motion raised three issues: (1) the evidence was insufficient to sustain the verdict; (2) the punishment was grossly disproportionate to the offense committed, and (3) "possible jury misconduct." The "possible" jury misconduct was based on the argument "It is not as clear as to whether or not the bailiff assisted the jurors as they attempted to comprehend the definition [of malice] given to them in the instructions."

Defendant submitted his investigator's statements of seven jurors. Only one of the seven jurors reported anything about the bailiff. The one juror reported, "I don't think we asked the judge [about the instructions], but we asked the bailiff what it meant. I think he answered it. I can't recall what the question was we asked." When questioned further about whether the issue was malice, the juror stated, "Yes, I think that was the big one that we couldn't figure out for the longest time. With a little help from the bailiff, or maybe it was the judge,

we figured it out. I'm not sure who we asked. I know we asked the bailiff if we could view the evidence."[4]

In his motion, defendant requested a hearing at which all of the jurors could be questioned about this subject. At the hearing on the motion, the defense asked for a continuance so they could subpoena the single juror who made the above statement and examine her under oath. The trial court denied the requested continuance. The bailiff was sworn and examined. The bailiff testified that nothing unusual happened during the jury deliberations, although the bailiff had no independent recollection of any particular contacts with the jury. The bailiff said he did not recall the jury asking him a specific question about the law or about malice, but that it could have happened. When asked for his response to this question, the bailiff testified: "So my normal response and my typical response is, always: [¶] Put it on a question form that I provided, clear, concise and legible. And I'll take it to the Judge, and they will answer that. It may take a minute before I come back with the answer." When asked if he would ever attempt to answer a question from the jury, the bailiff said: "Absolutely not." The trial court again denied defendant's request to continue the hearing. The court found "no evidence that the Bailiff improperly instructed the jury on the concept of malice."

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[4] Although the statement is not under oath, the People conceded it could be treated as if it had been given under oath.

"Evidence obtained by jurors from sources other than in court is misconduct and constitutes grounds for a new trial if the defendant has been prejudiced thereby." (*People v. Garcia* (2001) 89 Cal.App.4th 1321, 1338.) "'In ruling on a request for a new trial based on jury misconduct, the trial court must undertake a three-step inquiry. [Citation.] First, it must determine whether the affidavits supporting the motion are admissible. (Evid. Code, § 1150.) If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.] Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these issues, and its rulings will not be disturbed absent a clear abuse of discretion. [Citations.]'" (*Ibid.*)

"[I]t is within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. This does not mean, however, that a trial court must hold an evidentiary hearing in every instance of alleged jury misconduct." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 419, fn. omitted.) "[T]he defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." (*Id.* at p. 415.) "The hearing should not be used as a

'fishing expedition' to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred." (*Id.* at p. 419.)

Further, the "decision whether to grant a continuance of a hearing to permit counsel to secure the presence of a witness rests in the sound discretion of the trial court." (*People v. Roybal* (1998) 19 Cal.4th 481, 504.) "'To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*Ibid.*)

Here, the evidence proffered fails to demonstrate a strong possibility that prejudicial misconduct occurred. The defense evidence was that one out of seven of the jurors thought they might have asked the bailiff a question about malice. The juror said the answer to the question about malice came from the bailiff, "or maybe it was the judge." Ultimately, the juror concluded, "I'm not sure who we asked." Contrasted with this equivocal statement, the bailiff unequivocally testified he would never give the jury this type of information. Defendant's initial proffer was insufficient to require an evidentiary hearing at all. In light of the bailiff's testimony, and the complete lack of reference to this issue in any of the six other juror statements, we conclude the trial court did not err in

refusing to hold a further evidentiary hearing on the "possible" juror misconduct.

As to the continuance request, defendant failed to subpoena the witness for the hearing on the new trial motion and offered no explanation for his failure. Further, defendant failed to demonstrate he exercised due diligence to secure the witness's attendance or that the witness's testimony could be obtained within a reasonable time. In light of these circumstances, we conclude the trial court's refusal to grant defendant a continuance to present further evidence on this subject was not an abuse of discretion.

DISCUSSION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P.J.

NICHOLSON, J.